Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1978

No. 78-900

MAJOR EDWARD PAYNE,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions presented herein were raised in the Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of theft in office and intimidation. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Where an indictment for theft in office contains all of the elements of the offense plus an additional material allegation of fact, and the trial court instructs the jury that the additional material allegation of fact is one of the essential elements of the offense which must be proven beyond a reasonable doubt, and the jury returns a guilty verdict on all of the elements of that offense plus the material fact allegation, the petitioner's Sixth and Fourteenth Amendment rights are not violated where he was sufficiently apprised of the specific charges which he must defend by an indictment which was not misleading, was unambiguous and precise in that it enabled him to prepare a meaningful defense and avoid surprise.

2. An affirmance of a conviction for theft in office by a state appellate court on the ground that the state was not required to prove a material allegation of fact in the indictment where it has proved all of the essential elements of the crime charged beyond a reasonable doubt, conforms to due process of law, as the validity of petitioner's conviction was appraised on consideration of the case as it was tried and as the issues were determined in the trial court, and petitioner was fairly informed of the specific charges to which he had the opportunity to fully defend.

3. Testimony concerning the contents of a property tag placed on a piece of evidence is admissible as an exception to the hearsay rule concerning inscribed chattels if the trial court, exercising sound discretion, determines that the testimony of the witness can be substituted for the inscribed chattel itself.

STATEMENT OF THE CASE

On November 17, 1975, Major Edward Payne, the petitioner, was indicted by the grand jury of Cuyahoga County, Ohio, on two counts of Theft in Office, under Ohio Rev. Code §2921.41, and two counts of Intimidation, under Ohio Rev. Code §2921.03. A jury trial held in the Court of Common Pleas of Cuyahoga County, Ohio, in February, 1976, resulted in petitioner's conviction on one count of Theft in Office, which count had charged him with having ". . . obtained for his own use two 9-millimeter firearms, with pearl handles, from property lawfully seized by and in the possession of the Cuyahoga County Sheriff's Department," and on one count of Intimidation, which count had charged the petitioner with intimidation of Donald Campbell, a public servant, in the discharge of his duty. Judgment of acquittal was entered by the trial court on the other charge of Intimidation, and the jury acquitted the petitioner on the other charge of Theft in Office. The trial court imposed prison sentences of two to ten years and three to ten years upon the petitioner for his convictions, the sentences to run concurrently.

On appeal, the petitioner's convictions were affirmed by a divided Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio. The petitioner's subsequent application for reconsideration was denied by that court on March 21, 1978. Thereafter, on July 6, 1978, the petitioner's appeal as of right to the Ohio Supreme Court was dismissed on the ground that no substantial constitu-

tional question was presented. At the same time, that court overruled the petitioner's motion for leave to appeal. Major Payne's petition for rehearing was denied by the Ohio Supreme Court on September 7, 1978.

Donald W. Campbell, age thirty-two, and the father of two girls, was employed by the Cuyahoga County Sheriff's Department beginning January 13, 1975. His prior experience in law enforcement included positions as a Rocky River Police Officer, an Officer of the Richmond, California Police Department, and he was also a private investigator in the State of Arizona. Shortly after becoming employed by the Cuyahoga County Sheriff's Department, Campbell was chosen by petitioner, Major Edward Payne, to be one of the select members of Division 4, an undercover unit headed by Major Payne (R. 23). Division 4 specialized in using undercover deputies and informants in pursuit of illegal gambling, prostitution, narcotics and illegal liquor operations. (Defense witnesses testified that Division 4's purpose was to seek out those wanted on county capiases.)

On April 19, 1975 members of Division 4 of the Cuyahoga County Sheriff's Department, armed with a search warrant, conducted a raid at 10001 Cedar Avenue in the City of Cleveland, Ohio (R. 25). The Cedar raid was a back-up raid to an earlier visit to a west side cheat spot which was subsequently cancelled. Although Campbell attended the earlier attempted raid, he remained at Division 4 headquarters during the raid on Cedar. He worked on his duty reports at Division 4 headquarters until the raiding party returned from Cedar Avenue, at approximately 6:00 a.m. (R. 27). At this time Campbell observed evidence brought into Division 4 headquarters from the Cedar Avenue raid. This evidence consisted of liquor, gambling paraphernalia and firearms (R. 27, 28). Among

the firearms he observed that were brought in from the Cedar raid, were two 9 millimeter pistols, nickel plated with pearl handles. He observed these and other handguns in clear plastic evidence bags bearing yellow evidence tags (R. 29, 30). He observed the yellow tags on the 9 millimeter pistols bearing the address "10001 Cedar". Campbell further observed Detective Hosea Garner, at petitioner's request, placing these two 9 millimeter pistols in a brown bag, hand them to petitioner, whereupon petitioner removed the bag from the office of Division 4 (R. 32). Upon examining the office property book of Division 4 (State's Exhibit 2), Campbell described four pistols and one shotgun placed therein (R. 59). Needless to say, the two 9 millimeter pistols were not entered in State's Exhibit 2.

In later April or early May, Campbell made several visits to a cheat spot operated by Frank Sumpter located at 8416 Hough Avenue in the City of Cleveland. He gained entrance to this establishment because he was accompanied by a black informant named Sims Goodman, Jr. (R. 60). During these visits Campbell observed illegal gambling, drugs and prostitution (R. 62). A county search warrant was obtained and the Sumpter establishment was raided by Division 4 under the leadership of petitioner on May 9, 1975 (R. 62). Among the evidence seized at this raid was narcotics, firearms, clothing, stereo equipment and money (R. 68, 69). After this evidence was returned to Division 4 headquarters, an inventory was conducted that evening (R. 71). Deputy Campbell observed Deputy Garner place $250 in cash on Major Payne's desk, saying, "This is for the Major's expenses." (R. 79-80). Campbell had the opportunity to xerox the $250 in cash money before he observed petitioner put the cash in his pocket and leave Division 4 for the night (R. 81).

During the months of June and July, 1975, Campbell worked undercover with Deputy Phillip Vari, conducting his duties for Division 4 under the direction of Major Payne (R. 100). Campbell and Vari would report their nightly activities and location to petitioner at the East Town Motel which petitioner operated. Although dissatisfied with the operation of Division 4 and attempting to transfer out of Division 4 on two occasions in May and once in June, Campbell was ordered to remain in that capacity (R. 102).

On July 3, 1975, in company with Deputy Phillip Vari, while in the process of making a narcotic buy at the Mad Hatter Lounge on East 18th Street in the City of Cleveland, Campbell was seriously injured during a fist fight with several unidentified males (R. 104, 105). He was confined to his home and unable to return to his job until November of 1975. He did not return, however, because Sheriff Kreiger fired him in December of 1975.

During the month of July, 1975, Campbell received several visits from high-ranking officers of the Cuyahoga County Sheriff's Department at his home. All of these visitors were uninvited (R. 108). During each of these visits, Campbell underwent extensive interrogation pertaining to xerox copies, notes and activity reports that he had kept pertaining to irregularities in the operation of the Sheriff's Department and more specifically in Division 4 (R. 110-111). Although there were many demands to turn these records over to these Sheriff's Department Officers, Campbell refused to comply with their demands (R. 112). (All of the material possessed by Campbell were his own notes and copies of his reports; none of which belonged to the Cuyahoga County Sheriff's Department.)

On August 1, 1975, Campbell was called by petitioner on the telephone and was requested to meet him at the

East Town Motel the next day (R. 112). Campbell, his wife Judy, and Phillip Vari arrived at the East Town Motel at approximately 9:00 p.m. on August 2, 1975. They sat in the lounge and remained there approximately three hours having drinks and conversation with petitioner throughout the evening (R. 114). During this conversation Payne offered Judy Campbell a job at the East Town Motel. Throughout the evening the conversation changed to a more serious tone and centered upon the visits to Campbell's home during the month of July by officials of the Sheriff's Office and whether Campbell was cooperating with these officials. Payne then asked Campbell for all of his notes and records and Campbell refused to turn them over (R. 116). Payne then asked Campbell if he felt there was enough incriminating evidence against Sheriff Kreiger which would allow Payne to become the next Sheriff (R. 117). After Campbell refused to turn any of his records over to Payne, he was told that he would "never get to court with them." (R. 119). At this point Campbell and his party left the East Town at approximately 12:15 a.m. (R. 119). Campbell remained on sick leave until November 3, 1975, when he was ruled able to return to work (R. 225). Campbell was fired by Sheriff Kreiger in December of 1975.

Sims Goodman, Jr. worked as an informant for the County Sheriff's Department, Cleveland Police Department, and the Federal Narcotics Bureau. Goodman teamed up with Donald Campbell to make narcotics purchases at a dope house run by Frank Sumpter located at 8416 Hough Avenue, Cleveland, Ohio (R. 281). Goodman was present during the raid on Sumpter's establishment of May 9, 1975 and also observed money and other evidence on the desks in Division 4 headquarters after this raid (R. 296, 299, 300). On April 19, 1975, Goodman was in the area of 10001 Cedar Avenue when the Sheriff's Office Division 4 conducted its

raid at approximately 5:00 a.m. in the morning (R. 302, 304). He testified as seeing "high rollers" known as Big Jordan and Ivan Lapsley exiting the establishment after the Sheriff's Department's arrival (R. 307). From his prior experience as a "door shaker" at various after hours places in the City of Cleveland, he knew what weapons these men carried about their person (R. 308). He described their weapons as being nickel-plated 9 millimeter automatics with snow white grips (R. 309, 310). Approximately three days after the above raid Goodman had occasion to ask Big Jordan for his pistol at Goldie's Lounge. He was handed a black pistol with brown grips on same (R. 311). Cross-examination of Goodman revealed the following (R. 369-371):

"Q. You didn't see it that night?

A. No, sir.

Q. What did you see that night?

A. I saw a different automatic.

Q. Was that the one the government issued?

A. It's like a government issue, yes.

Q. And at that time did you have any conversation with Mr. Lapsley about the gun?

A. Yes, sir.

Q. You had some conversation?

A. Yes, sir. I said, 'Man, where your piece at?'

Q. What did he say?

A. His reply was, 'Some bright nigger got it.'

Q. Sir?

A. 'Some bright nigger got it.'

Q. Did you have any further conversation?

A. No, sir. I just presumed I knew where it went.

Q. Did you have any further conversation with Mr. Lapsley relative to the gun?

A. No, not about the gun.

Q. Did Mr. Jordan come in the same night?

A. Yes. Sometime along about daybreak, it was a big game.

Q. Did you have occasion to shake him down?

A. I just asked him.

Q. And he gave you the weapon?

A. He gave me the weapon.

Q. What was the description of that?

A. A government issue, black with brown handles.

Q. Did you have any conversation with him?

A. No. I told him I knew where it went.

Q. Were you present when this white-handled 9 millimeter disappeared?

A. No, sir.

Q. You didn't see anybody take it?

A. No, sir.

Q. And he didn't tell you anybody took it, did he?

A. Not that particular time.

Q. Well, did he tell you later?

A. Yes, sir.

Q. When was that?

A. It was an occasion at a hotel downtown, the Holiday Inn that's on 20th something.

Q. When was that?

A. Maybe about a week later.

Q. A week later?

A. Yes.

Q. You met him at the Holiday Inn?

A. Yes, uh huh.

Q. And you had conversation about this weapon?

A. Yes. I was kidding with him about his gun.

Q. Who did he tell you took it, then?

A. He said, 'That nigger Payne got my gun.'

Q. 'That nigger Payne got the gun.'

A. Yes.

Q. And that's the night of the raid on April 19th at 10001 Cedar?

A. Well, I filled that part in myself.

Q. You filled in that part—

A. Uh huh, with him face to face, and he didn't deny it.

Q. Let me finish my question.

Mr. Jordan never told you that it was taken on April 19th, 1975, at 10001 Cedar Avenue, by Payne, did he?

A. No, he never came right out and said that.

Q. And Mr. Jordan is still out in that area, is he not?

A. He's still out on the street, yes.

Q. And so is Mr. Lapsley?

A. Yes.

Q. And of course when you talked to Mr. Lipold and Mr. Walsh, last Thursday, you told them this, didn't you?

A. Yes.

Q. And you told them you had the conversation with these two gentlemen about the guns, didn't you?"

Judy Campbell, Donald Campbell's wife of twelve years and mother of their two children, testified to being present in their home during two or three of the visits by officials of the Sheriff's Office in the month of July, 1975 (R. 415, 416). She indicated that one of these visits by Major Kulis and Marion Koscewski lasted 10 1/2 hours (R. 418). On August 2, 1975, she accompanied Donald Campbell and Phillip Vari to the East Town Motel where they remained for approximately three hours (R. 421). She described to the jury how the conversation changed from a pleasant note to one of blatant intimidation and corroborated Donald Campbell's testimony concerning this count of the indictment. Upon hearing the words, "You'll never get to court" she stated she left the East Town because "She was afraid." (R. 423-426). She further testified that her husband's notes and reports that he had been saving were stolen in a home burglary (R. 427). In describing the 10 1/2 hour visit by the aforementioned officials of the Sheriff's Department in July she vividly described how she herself was threatened with having her character maligned if her husband did not cooperate with them and turn over that which they were requesting. The only way she got these officials to leave their home that night was by threatening to call the Westlake Police Department (R. 461).

Phillip Vari, a Deputy Sheriff, and partner of Donald Campbell, corroborated the meeting and subsequent threats at the East Town Motel on August 2, 1975 (R. 470-477). When asked if he reported the intimidation and other irregularities which he described to Sheriff Kreiger, Vari testified how he attempted to do so and Kreiger slammed the door in his face, and that "no one would listen to me." (R. 499-501).

James Marino, a reporter for the Cleveland Press for 4 1/2 years assigned to the Criminal Courts beat, testified to knowing petitioner for the last three years. As he had done on previous occasions, Marino accompanied the Division 4 officials at the Cedar Avenue raid on April 4, 1975 (R. 505). Marino saw firearms and other evidence confiscated and removed from 10001 Cedar that morning. He further testified that Payne specifically told him *six* handguns and one shotgun were seized and fifty-two people were arrested at this raid (R. 506, 507). He reduced this information to a news article which was admitted as State's Exhibit 5 (R. 508).

Defense Evidence

Deputy Edward Thornton testified that neither Campbell nor Payne were up in Division 4 headquarters when the inventory and the theft of firearms allegedly occurred on April 9, 1975 (R. 626). He stated that between forty-five and fifty people were arrested that particular night. He further described the methods used by the Sheriff's Department in placing a yellow tag on each weapon that is seized on any of their raids (R. 633). Thornton himself found no weapons that particular night (R. 641).

Deputy George Burress was at the raid on April 19, 1975 and testified that forty-four males and eleven females were arrested that night (R. 659). He further testified

that Payne was not present in Division 4 headquarters on the morning of the alleged thefts (R. 661). He also testified that Campbell was not upstairs that morning after the raid and that Deputy Thornton was also not up in Division 4 headquarters after the raid (R. 682, 683). (Thornton testified that he assisted Burress in preparing the inventory after the raid in Division 4 headquarters.) Burress testified that no automatic weapons were seized; while Thornton testified there was one automatic weapon seized (R. 689). Burress testified that the inventory took between one and two hours to complete (R. 690). Thornton testified that this procedure took thirty-five minutes. Burress further testified as being involved in the Sumpter raid on May 9, 1975; but when shown a copy of his official report about his activities during this raid he stated that the signature upon that report was not his and that someone else prepared it! (R. 712, 713) (See State's Exhibits 6 and 6A).

Powell Caesar, a reporter for the Call and Post Newspaper was present at the raid on April 19, 1975 at 10001 Cedar Avenue. He testified as observing various persons being searched and seeing some weapons dropped to the floor (R. 724). He took forty photographs of this particular raid, some of which were offered as Defense Exhibits (R. 725). Caesar stated that he saw four handguns and one shotgun seized on the night in question (R. 727); but he presented *no* photographs of any weapons, claiming that they did not photograph well (R. 736). He further described observing stolen clothing on the premises at Cedar Avenue and presented photographs of same but no clothing appeared on any search warrant return or inventory filed subsequent to this raid (R. 746).

Larry Bly was a Deputy Sheriff assigned to Division 4 headquarters on April 19, 1975 and assisted in transport-

ing evidence from 10001 Cedar to Division 4 headquarters after the raid. He testified that Campbell was not upstairs subsequent to this raid on April 19, 1975 (R. 759-761). Based upon his prior experience in Division 4, Bly expected to find weapons at the Cedar Avenue raid and described how weapons seized are tagged and transported in plastic bags from the scene of the raid back to Division 4 (R. 780, 822).

Lee Jordan, a.k.a. "Big Jordan" testified to knowing petitioner for the last six years (R. 854). He stated that he ran a grocery store and that he never owned a gun (R. 855). He further denied ever being on Cedar Avenue, more particularly at 10001 Cedar on April 19, 1975; and further stated that he never went anywhere other than to his store (R. 856). He further testified to knowing Ivan Lapsley who he described as "Van" for the last ten years (R. 863). On cross-examination he described his 1973 Cadillac as being worth $12,000, that he was familiar with the term "door shaker" and then admitted owning a .38 caliber handgun (R. 868, 869).

Ivan Lapsley testified to knowing petitioner for at least six or seven years. He listed his occupation as being the manager of a grocery store (R. 881). He denied that Sims Goodman ever worked for him running numbers and further denied ownership of a 9 millimeter semi-automatic. He further stated that he never frequented Goldie's Lounge (R. 882). He described his automobile as being a 1975 Cadillac Fleetwood, that he has known "Big Jordan" for twenty years and that he was not at 10001 Cedar Avenue on April 19, 1975 (R. 886-887, 896).

Deputy Earnest Graves testified to his involvement in the Sumpter raid on May 9, 1975. He assisted in counting the money seized in this raid and observed money taken into petitioner's office by Major Payne himself but did not

see anyone remove any money from Division 4 headquarters (R. 921, 922).

Keldon Casey testified to knowing petitioner for at least five years and that he was at the East Town Motel on August 2, 1975 (R. 936, 937). Casey described how the petitioner introduced him to three white people, remembering their names to be Campbell and Vari and further stated that he was positive Mrs. Campbell had blonde hair (R. 939, 949). He further testified that he remained at the table with the Campbells and Vari for three and one-half hours until 2:00 a.m. when they left. He testified he had never met any of these people before; they were complete strangers; they talked about the band and other small talk and he denied any heated argument or discussion between the petitioner and his guests (R. 964, 965).

Marion Koscewski, Sheriff Kreiger's Chief Administrative Assistant, testified he was at the Cedar Avenue raid on April 19, 1975, and did not see Major Payne back at Division 4 headquarters after the raid (R. 981). He admitted visiting Campbell at his home in July of 1975 with Major Kulis and that they took two statements from Campbell which took 10 1/2 hours (R. 987, 993). While being at the April 19th raid Koscewski was a professional photographer and described his function as being to photograph evidence in its place. On cross-examination, after being asked why he presented no photographs of evidence seized on the night in question Koscewski testified this his flash malfunctioned. He stated this had happened to him six times before and yet carried no spare flash attachment (R. 1001, 1002). He testified that fifty-two people were arrested at the raid on April 19, 1975 (R. 1007). Koscewski arrived at the East Town Motel just as the Campbells were leaving on August 2, 1975, and described Judy Campbell's hair as being "light." (R. 1023).

Captain Ronald Brown testified to his participation in the Cedar Avenue raid on April 19, 1975. He had occasion to search some of the occupants of that premises and seized one handgun from an unidentified male patron. He saw other handguns seized but could not describe the number and type of weapons involved (R. 1066). Brown admitted to making four uninvited visits to the home of Campbell during the month of July and took at least one statement from Campbell during his period of time. He stated that he was acting on orders of Sheriff Kreiger in making these visits. Brown then described several allegations that were being circulated against Donald Campbell concerning his conduct both on and off duty but admitted on cross-examination that these allegations were never proven to be true (R. 1904-96).

Detective Hosea Garner testified that more than fifty people were arrested at the Cedar Avenue raid on April 19, 1975 (R. 1111). He denied handing two 9 millimeter handguns to Major Payne in Division 4 headquarters on May 9, 1975 (R. 1115). He further denied handing $250 in cash to Payne in Division 4 headquarters on May 9, 1975 following the Sumpter raid (R. 1140). On cross-examination, Garner was allowed to review his official report of the April 19th raid wherein he described forty-four people being arrested (R. 1189). Also, on cross-examination, he was shown a photograph depicting clothing seized in the Cedar Avenue raid; but he admitted that this clothing never made it back to Division 4 headquarters (R. 1192). Garner also testified that petitioner was not in Division 4 headquarters after the raid on April 19, 1975 (R. 1197).

Rebuttal

Judy Campbell was the State's single rebuttal witness. She produced State's Exhibit 11, a photograph taken at the

table in the East Town Motel on August 2, 1975 (R. 1260-61). In this color photograph (which was autographed by newscaster Furnell Chapman and the bandleader Redd Holt), appear Donald Campbell, Judy Campbell, and Phillip Vari. Not only are they the only people sitting at the table, but Judy Campbell's hair is dark brown. Se further testified that she never met a Keldon Casey and that no one other than Major Payne sat with them at their table that evening (R. 1262, 1263).

REASONS FOR DENYING THE WRIT

1. Where an indictment for theft in office contains all of the elements of the offense plus an additional material allegation of fact, and the trial court instructs the jury that the additional material allegation of fact is one of the essential elements of the offense which must be proven beyond a reasonable doubt, and the jury returns a guilty verdict on all of the elements of that offense plus the material fact allegation, the defendant's Sixth and Fourteenth Amendment rights are not violated where he was sufficiently apprised of the specific charges which he must defend by an indictment which was not misleading, was unambiguous and precise in that it enabled him to prepare a meaningful defense and avoid surprise.

Petitioner seeks to penalize the State for undertaking a heavier burden of proof than was necessary in order to convict him of theft in office. We note with interest that no objection was ever raised at the trial level to the wording of either the indictment, bill of particulars, charge to the jury or verdict forms. The reason for no objection by petitioner's counsel at the trial stage is rather obvious. It is

a windfall upon the accused to have the prosecution, who has the burden of proving each and every element of the offense charged by evidence beyond a reasonable doubt, undertake to prove an additional, unnecessary and surplus element in the offense of theft in office. Why should he object when benefit only enures to his side of the table and a detriment upon the prosecution? He knows, by means of the indictment and bill of particulars what charges are lodged against him and now he must defend against them.

If the State wants to show that the guns were not only in possession of the Sheriff's Department at the time of their taking but were indeed "lawfully seized" in that raid, let them try to prove it. The point is, how has the petitioner been prejudiced by the appellate court ruling that the trial court did not err when he charged the jury on the issue of lawful seizure of the weapons? The appellate court did, after all, find sufficient evidence on each element of the offense charged to sustain a conviction. The fact that the appellate court ruled that the additional material allegation of fact in the indictment need not be proven in no stretch of the imagination can be construed as being a denial of fair notice of the specific charges against which he must defend as outlined in *Faretta v. California*, 422 U.S. 806 (1975) and *Russell v. United States*, 369 U.S. 749 (1912).

Petitioner's further contention that the action of the appellate court altered the charge originally brought against the accused in the course of affirming his conviction does not reflect the existing state of law. His reliance upon this Court's decision in *Cole v. Arkansas*, 333 U.S. 196 (1948) is, indeed, misplaced when we compare both fact situations. In *Cole, supra*, convictions were had in an Arkansas court under an information which charged defendants with violation of Section 2 of an Arkansas statute. On appeal to the state supreme court, however, that court affirmed the convictions on the basis, not of Section 2, but of Section 1 of the statute, failing to consider either the sufficiency of the evidence to sustain the convictions under Section 2 or the constitutional objections raised by the appellants to that section. In an opinion by Justice Black, it was held that an affirmance of this kind had the effect of convicting the defendants without a trial, and was therefore a violation of procedural due process under the Fourteenth Amendment. We heartily agree with the contention that "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *DeJonge v. Oregon*, 299 U.S. 353, 362, 81 L. Ed. 278, 282, 57 S. Ct. 255.

Again, petitioner's attempt to characterize the instant case with *Cole* has no merit. The appellate court in *Cole* affirmed petitioner's convictions as though they had been tried and convicted of a separate and distinct section of a statute which was substantially different and distinct from the offense charged. Accordingly, this Court felt constrained to hold that petitioners were denied safeguards guaranteed by due process of law—"safeguards essential to liberty in a government dedicated to justice under law." *Cole, supra*, p. 202.

Contrary to petitioner's insistence that the appellate court "altered" the offense charged in the indictment, the most that can be read out of their affirmance is that they would not set aside the jury's finding of guilt and, while doing so, ruled that the state *need not* have proved the "lawful seizure of the pistols in question." Nowhere in the majority opinions can be found an assertion that the state failed to prove that the weapons were lawfully seized.

2. An affirmance of a conviction for theft in office by a state appellate court on the ground that the state was not required to prove a material allegation of fact in the indictment where it has proved all of the essential elements of the crime charged beyond a reasonable doubt, conforms to due process of law, as the validity of petitioner's conviction was appraised on consideration of the case as it was tried and as the issues were determined in the trial court, and petitioner was fairly informed of the specific charges to which he had the opportunity to fully defend.

We couldn't agree more with petitioner that the state's theory of the case, from the outset, was that the theft in office conviction was predicated on two handguns seized from 10001 Cedar Avenue. Although not necessary, the indictment and bill of particulars spelled out that these weapons had been lawfully seized by the Sheriff's Office. Evidence at trial was voluminous in this regard. All the state need prove for a theft in office conviction was that the subject of the theft was in the custody of the sheriff—and not where the sheriff had seized the property. But the state wanted to impress upon the jury, and succeeded in doing so, that it could trace these particular handguns to a specific raid conducted by the petitioner. It is rather evident that the jury believed the witnesses produced by the state and disbelieved the witnesses for the petitioner. The state never changed its theory of the case and neither did the appellate court's opinion. At all times the petitioner was apprised of the specific nature of the charges against him. Too often, cases reach this court where an accused had no idea what charges were being pressed against him or who was the subject of the complaint.

In *Russell v. United States*, 369 U.S. 749, cited by petitioner, the petitioners were indicted for failure to answer

questions before a congressional subcommittee. The indictment in that case failed to identify the subject under committee inquiry at the time the witnesses were interrogated.

Nor is petitioner's case aligned with *Groppi v. Leslie*, 404 U.S. 496, 30 L. Ed. 2d 632, decided January 13, 1972. In that case, Groppi led a gathering onto the floor of the Wisconsin State Assembly and was found in contempt for disrupting business. The contempt resolution was adopted without giving notice to or giving petitioner an opportunity to defend himself. This Court reversed, holding that due process was violated by failing to give notice to petitioner or an opportunity for him to respond to the charges.

In the instant case, the state, exercising an abundance of caution and a fair sense of justice, disclosed more of its theory of prosecuting the petitioner than it was legally obligated to. Such good faith and full disclosure cannot in any way conceivable be construed as misleading petitioner into a false sense of security, as petitioner argues. Surely he cannot be serious when he argues that he merely had to create a reasonable doubt before the jury that the guns were lawfully seized and he would be acquitted. This argument is refuted by reading the record of proceedings, wherein we see no objection to testimony concerning the guns and their seizure, no argument to the jury concerning unlawful seizure of the guns, and no objectoin to the jury instructions on "guns lawfully seized." The case, practically speaking, boiled down to credibility of witnesses, that is, the jury believed Donald Campbell and Sims Goodman and disbelieved the defense witnesses.

There was no issue concerning lawful seizure of the guns at the trial level, and this issue should not be permitted to lure this Court into granting certiorari.

3. Testimony concerning the contents of a property tag placed on a piece of evidence is admissible as an exception to the hearsay rule concerning inscribed chattels if the trial court, exercising sound discretion, determines that the testimony of the witness can be substituted for the inscribed chattel itself.

We strongly disagree with petitioner's characterization of Campbell's testimony about the contents of a property tag being a "statement." Prior to this testimony the evidence was that a raid had been conducted by petitioner on Cedar Avenue and weapons, money and gambling devices were brought into the office by Sheriff's personnel. Testimony was further elicited concerning the method of bagging and labeling firearms that were confiscated. Campbell then testified as to what he saw—two pearl-handled pistols in a plastic bag with a yellow label containing an address—"10001 Cedar." How does this situation differ from a witness testifying to a license plate number he observed at a crime or accident scene? There is no distinction. The testimony was circumstantially corroborative evidence that these guns came from the Cedar raid. The jury could draw whatever inference they chose from this testimony. The jury had the right to hear such evidence to decide whether the guns in question were under control of the Sheriff's Office prior to petitioner's removing them. The jury convicted the petitioner of *theft in office*. The appellate court affirmed the petitioner's conviction for *theft in office*. The petitioner knew what he was charged with, the elements of the offense and how he must meet those charges. His vain attempt at refuting those charges failed; and nothing occurred at the trial or appellate level that denied him his rights guaranteed under our Constitution.

CONCLUSION

Due process was served upon petitioner throughout his trial and appeals. Accordingly, we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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